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SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 164.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers of WABASH RAILWAY COMPANY, a Corporation,

Petitioners,

vs.

RICHARD F. WILD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners,

vs.

RICHARD F. WILD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Respondent considers the petitioners' statement of this case to be inaccurate, unduly prolix, and biased and partisan, so as to require that respondent make a statement of his own.

THE FACTS.

On February 18, 1938, the respondent, Richard F. Wild, was a switchman of over fifteen years experience, in the employ of petitioners, who were the Receivers for the Wabash Railway Company and operating its properties as common carriers by railroad engaged in interstate commerce and transportation (R. 4-5), and working in petitioners' Luther avenue yard at St. Louis, Missouri (R. 22). At about 6:40 p. m. on that day respondent Wild, while engaged in the course and scope of his aforesaid employment there, was working upon a certain box car, designated as L. & N. 12670, and being the property of the Louisville & Nashville Railroad Company, which was being moved by one of petitioners' switching crews over, along and into a specifically designated track in petitioners' yard for the purpose of being put into a train being made up on that track and destined for Des Moines, Iowa (R. 22-23). This car contained an interstate load of pipe originating at Paladiga, Alabama, and destined for Minneapolis, Minnesota (R. 120, 204, 207); it had been hauled over various railroads from its point of origin to St. Louis, Missouri (R. 120, 203, 213-216); it had been delivered by a connecting carrier to petitioners at about 6 p. m. on that day (R. 213-215, 216-218); and it was to be taken in petitioners' aforesaid Des Moines train to Albia, Iowa, where it would be transferred to another connecting carrier for further transportation toward its ultimate destination (R. 23, 215-216).

The movement being made was a southward movement over and into petitioners' track No. 1 (R. 85, 271, 272), and the car L. & N. 12670 was the southernmost of a cut of cars being shoved into that track by an engine attached to the north end of the cut of cars (R. 23, 24, 85). Respondent's duty required that he attend to the setting of the hand brake upon this car (R. 24, 103), and, accord-

ingly, he got upon the north end of the east side of the slowly moving car (R. 24, 25, 26) and climbed up the ladder there to get to the brake platform and brake wheel, which were located on the north end of the car (R. 24-25, 85).

The brake platform and brake mechanism on the north end of this box car L. & N. 12670 was typical of the old staff-and-wheel type hand brake in common use on railroads for many years, and which type of brake is clearly illustrated by the photographs offered in evidence as Defendants' Exhibits 10 (R. 125), 11 (R. 126) and 12 (R. 164). Essentially, this type of brake consisted of a vertical brake staff, which passed through a horizontal wooden brake platform located on the end of the car some two or three feet below the car roof, with a horizontal brake wheel attached to the upper end of the staff, with a brake chain attached to the lower end of the staff, and with a ratchet wheel and pawl arrangement attached on the upper side of the brake platform—the purpose of the ratchet wheel and pawl being to hold the brake set in the various degrees of tension in a tightening of it, and to prevent the brake from reversing or releasing when being set (R. 25-28, 85-86).

When respondent got onto the car he climbed to the brake platform (R. 25), which placed him facing toward the south (R. 26). He then placed his left foot against the outer edge of the pawl or "dog" to engage it with the teeth of the ratchet wheel (R. 26, 86), and turned the wheel in a clockwise direction to tighten the brake (R. 26, 87). He continued to so turn the brake wheel until he had tension on the brake (R. 26, 29, 86, 87), and, as he did so, he kept his left foot against the pawl and the pawl meshed in the teeth of the ratchet wheel (R. 27, 29, 86), and he heard the pawl or dog "clicking" in the teeth of the wheel as it turned (R. 27, 87, 108)—which was the

usual, customary and proper way to set such a brake (R. 29, 79). After respondent had tension on the brake, and while he still had his foot against the pawl and without any change, slipping or other movement of his body (R. 30, 32, 108), the pawl or "dog" failed to hold the brake in position and to keep it from reversing (R. 108) and the brake suddenly reversed itself, and the wheel spun in the opposite direction to which he had been turning it, and threw him off the car to the ground causing him to be seriously injured (R. 26, 29, 86-87, 101).

In applying this brake on this occasion, respondent Wild used every device known to him to properly apply it and to keep it from reversing (R. 78, 79), and, in his opinion, the pawl or "dog" either slipped above or below the wheel of the ratchet (R. 108). The reversing of a brake, under the circumstances described, is an abnormal thing (R. 29-30), and, if a brake is an efficient one, it will not, under such circumstances, reverse as this one did (R. 30-32).

Before the injury to respondent the trains containing this car, L. & N. 12670, had been inspected at Nashville, Tennessee (R. 120-123, 146-147, 164-166, 199-200, 201-203), at East St. Louis, Illinois (R. 203-212), and at defendants' Luther Avenue yard in St. Louis, Missouri (R. 213-220, 241-242). This particular car, L. & N. 12670, was also inspected some thirty minutes after the injury to respondent Wild (R. 220-226, 244-245, 253-254, 257-259), and again the following morning (R. 259-260, 264, 265-266, 269). All of these inspections were made while the car was standing still (R. 160, 225, 235, 251); all of the inspections made prior to respondent Wild's injury were purely visual and without any test being made of the brake (R. 141, 145, 149, 203, 210-211, 229, 242, 248-249), and those inspections made after the injury included such tests of setting and releasing the brake as might be made on a standing car (R. 224-

225, 245). These tests failed to disclose any physical defect in the brake, or any improper operation in the setting or releasing of the brake while the car was standing. The efficiency of a hand brake on a car cannot be tested with the car motionless (R. 172, 308-309).

THE PROCEEDINGS BELOW.

On August 15, 1938, respondent Wild, as plaintiff, brought this action against petitioners here, as defendants, in the Circuit Court of the City of St. Louis, Missouri, to recover damages on account of his aforesaid injury (R. 1). His petition (R. 2-4), or complaint, after alleging the facts essential to invoke the application of the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-59), grounded a recovery upon a violation of the Supplement of 1910 to the Federal Safety Appliance Act (Act of Apr. 14, 1910, c. 160, 36 Stat. 298, 45 U. S. C. A., §§ 11-16) and the order of the Interstate Commerce Commission entered on March 13, 1911, pursuant to the authority contained in Section 12 of the Safety Appliance Act (Act of Apr. 14, 1910, c. 160, sec. 3, 36 Stat. 298, 45 U. S. C. A., § 12) relating to the equipment of box cars with "efficient hand brakes." The petition, in respect to the violation of the Safety Appliance Act and the aforesaid order of the Interstate Commerce Commission, alleged (R. 2-3):

> "* * * that on * * * the 18th day of February, 1938, he [plaintiff] was a servant and employee of defendants, working as a switchman in, upon and about defendants' cars, trains and locomotives on the lines of defendants, and * * * while plaintiff, pursuant to his aforesaid employment by defendants, was working as such servant and employee of defendants in, upon and about trains and cars which were then and there being hauled, used, moved, transported and classified on defendants' lines in defendants' Luther Avenue Yard in the City of St. Louis, Missouri, * * *

> plaintiff was upon a box car and did attempt to operate a hand brake thereon; that said hand brake was inefficient and did suddenly, violently, and unexpectedly spin, turn, twist, revolve, vibrate, chatter, directly thereby causing plaintiff to be thrown from said box car to the ground and to sustain the injuries hereinafter more particularly alleged, all of which directly and proximately resulted from defendants' failure to perform their duty, under the statutes of the United States of America (commonly known as the Federal Safety Appliance Act), and the orders, rules and regulations of the Interstate Commerce Commission of the United States made and promulgated pursuant thereto, in such cases made and provided, to have said box car equipped with an efficient hand brake."

The petition then went on to allege that "as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States of America and the aforesaid orders, rules and regulations of said Interstate Commerce Commission," plaintiff received the injuries detailed in the petition (R. 3).

The answer filed by the petitioners here, as defendants in the trial court, admitted that they were the Receivers of the Wabash Railway Company, in charge of and operating its properties and trains as common carriers by railroad engaged in interstate commerce and transportation, and denied every other allegation of the petition (R. 4-5).

At the trial the jury was instructed, at the instance of both parties (R. 315-316, 317, 318), that, as a condition for a verdict in favor of plaintiff, it was necessary for them to find that the hand brake upon car L. & N. 12670 was "inefficient," and that respondent Wild (plaintiff) was injured as a direct and proximate result of the "inefficiency" of the hand brake. None of the instructions given, and

none of the instructions refused (R. 320), dealt with the hand brake being "defective," as distinguished from "inefficient." The jury found for respondent Wild, plaintiff below (R. 1b, 5, 324), and the judgment entered in his favor upon the verdict (R. 1b, 5) was affirmed by the Supreme Court of Missouri, Division No. 1 thereof, after plaintiff had entered an enforced remittitur ordered by said Supreme Court of Missouri (R. 335, 349-350).

The opinion of the Supreme Court of Missouri is not yet officially reported, but it is reported as Wild v. Pitcairn (Mo. Sup.), 149 S. W. 2d 800, and appears in full in the record herein (R. 336-348).

Following the overruling of their motion for a rehearing by the Supreme Court of Missouri (R. 350, 364) and their motion to transfer the cause to the Supreme Court of Missouri en banc (R. 364, 373), petitioners (defendants) have applied here for certiorari to review the judgment of the Supreme Court of Missouri.

SUMMARY OF ARGUMENT.

I.

There was no error in the ruling and decision of the Supreme Court of Missouri to the effect that the plaintiff's petition (R. 2-4) properly pleaded a violation by petitioners of the supplement of 1910 to the Safety Appliance Act (Act of April 14, 1910, c. 160, 36 Stat. 298, 45 U. S. C. A., §§ 11-16) relating to the equipment of cars with efficient hand brakes. Under the Safety Appliance Act there is imposed upon the carriers an absolute duty to have any and all cars used or hauled by them equipped with the appliance required by the act.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061;

Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559;

Louisville & N. R. Co. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931;

Great Northern R. Co. v. Otos, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322;

Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 36 S. Ct. 682, 60 L. Ed. 1125;

Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874;

Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995;

Brady v. Terminal R. Assn. of St. Louis, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614.

II.

(A) There was no error in the opinion and decision of the Supreme Court of Missouri in ruling to the effect that proof of a specific physical defect in a hand brake was not essential to the establishment of a violation of Section 11 of the Safety Appliance Act (45 U. S. C. A., § 11), requiring the equipment of cars with "efficient hand brakes," and that proof of the failure of a hand brake to work efficiently, when used in the customary and proper manner, was sufficient proof of violation of the act to fasten liability on the carrier.

Lehigh Valley R. Co. v. Howell, 2 Cir., 6 F. 2d 784, certiorari denied 268 U. S. 695, 45 S. Ct. 513, 69 L. Ed. 1162;

Didinger v. Pennsylvania R. Co., 6 Cir., 39 F. 2d 798;

Detroit, T. & I. R. Co. v. Hahn, 6 Cir., 47 F. 2d 59, certiorari denied 283 U. S. 842, 51 S. Ct. 489, 75 L. Ed. 1452;

Chesapeake & O. R. Co. v. Gowen, 6 Cir., 65 F. 2d 260;

Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522;

Henry v. Cleveland, C. C. & St. L. R. Co., 332 Mo. 1072, 61 S. W. 2d 340, certiorari denied 290 U. S. 627, 54 S. Ct. 70, 78 L. Ed. 546;
Colwell v. St. Louis-S. F. R. Co., 335 Mo. 494, 73 S. W. 2d 222;
Cason v. Kansas City Terminal R. Co. [Mo. Sup.], 123 S. W. 2d 133;
Gieseking v. Litchfield & Madison R. Co. [Mo. Sup.], 127 S. W. 2d 700, certiorari denied 308 U. S. 583, 60 S. Ct. 104, 84 L. Ed. 488;
Anderson v. Chesapeake & O. R. Co., 352 Ill. 561, 186 N. E. 185, certiorari denied 290 U. S. 675, 54 S. Ct. 93, 78 L. Ed. 583;
Hosman v. Southern Pac. Co., 28 Cal. App. 2d 621, 83 Pac. 2d 88, certiorari denied 306 U. S. 656, 59 S. Ct. 645, 83 L. Ed. 1054;
Spencer v. Seaboard Air Line R. Co., 201 N. C. 537, 160 S. E. 763, certiorari denied 285 U. S. 539, 52 S. Ct. 312, 76 L. Ed. 932.

(B) As in the case of the requirement of the Safety Appliance Act relating to the equipment of cars with automatic couplers, the test of the compliance with the requirement of the act pertaining to efficient hand brakes is effectiveness and efficiency in the operation of the appliance.

Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204;
San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110;
Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995;
Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, § 640, p. 1232.

III.

There was no error in the opinion and decision of the Supreme Court of Missouri to the effect that the pleading and the proof was sufficient to permit the respondent

(plaintiff) to recover by reason of petitioners' violation of the order of the Interstate Commerce Commission made and entered on March 13, 1911, pursuant to the provisions of Section 12 of the Safety Appliance Act (45 U. S. C. A., § 12). The Commission's order, like Section 11 of the Safety Appliance Act (45 U. S. C. A., § 11), required simply that box cars be equipped with "efficient hand brakes."

Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, pp. 2010-2012;

Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522.

IV.

There was no error in the opinion and decision of the Supreme Court of Missouri to the effect that petitioners' violation of Section 11 of the Safety Appliance Act (45 U. S. C. A., § 11) constituted negligence under the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-59), so as to permit respondent (plaintiff) to maintain an action for his injuries under the latter act.

San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110;

Moore v. Chesapeake & O. R. Co., 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755.

V.

The Supreme Court of Missouri did not err in failing to follow the latest ruling of the federal courts upon the issues involved. The opinion and decision of the state court was in complete harmony with those rulings and decisions of this and the other federal courts which are cited above under points I and IV, inclusive.

ARGUMENT.

I.

The first point made by petitioners here ultimately resolves itself into nothing more than a contention that respondent's (plaintiff's) petition is insufficient to charge petitioners (defendant) with a violation of the provisions of the Safety Appliance Act relating to hand brakes, which contention is based upon petitioners' assertions that, while the act made it unlawful for them to haul a car not equipped with an efficient hand brake, it did not require them to equip this car L. & N. 12670, which was owned by another railroad, with such a hand brake, and that respondent's (plaintiff's) petition predicates liability solely upon petitioners' (defendants') failure to equip that car with such a hand brake. Neither of these assertions is tenable.

In so far as it is here pertinent, the provision of the Safety Appliance Act relating to hand brakes (Act of Apr. 14, 1910, c. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A., § 11) provides:

> "**It shall be unlawful for any common carrier** subject to the provisions of this chapter **to haul, or permit to be hauled or used on its line any car** subject to the provisions of this chapter **not equipped with the appliances herein provided for, to wit: All cars must be equipped with * * * efficient hand brakes * * *.**" (Emphasis supplied.)

And the penalty section of the act (Act of Apr. 14, 1910, c. 160, Sec. 4, 36 Stat. 299, 45 U. S. C. A., § 13), in so far as is here pertinent, provides:

> "**Any common carrier** subject to this chapter **using, hauling, or permitting to be used or hauled on its line, any car** subject to the requirements of this chapter

> **not equipped as provided in this chapter, shall be liable** to a penalty * * * and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such a car which is defective or insecure or **which is not maintained in accordance with the requirements of this chapter** * * *." (Emphasis supplied.)

A mere reading of the pertinent provisions of this act shows that, by very specific language, it makes unlawful a carrier's use or hauling, or a carrier's permitting the use or hauling on its line, of *any car* not equipped with an "efficient hand brake." As this Court has so aptly said, violation of the act, and liability under it, "springs from its being made unlawful to use cars not equipped as required" (Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 621, 37 S. Ct. 456, 61 L. Ed. 931), and "if the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it" (St. Louis & I. M. Ry. Co. v. Taylor, 210 U. S. 281, 295, 28 S. Ct. 616, 52 L. Ed. 1061).

Now, a mere reading of the respondent's (plaintiff's) petition in this case (R. 2-4), the material portions of which we have heretofore quoted herein (ante, pp. 5, 6), and will not repeat, conclusively demonstrates that it alleges the facts that plaintiff, while working upon cars being "used, hauled, moved, transported and classified on defendants' lines in defendants' Luther Avenue Yard," and while attempting to use a hand brake on one of said cars—being L. & N. 12670, was thrown from said car and injured by reason of the sudden reversing of said hand brake, which was inefficient, as a result of the defendants'

failure to comply with the provisions of the Safety Appliance Act, and the orders of the Interstate Commerce Commission, requiring that cars "used" or "hauled" by a carrier be equipped with "efficient hand brakes." The petition, therefore, properly and sufficiently pleaded the facts essential to predicating petitioners' liability upon a violation of the act and the said orders of the Interstate Commerce Commission requiring efficient hand brakes, and the opinion and decision of the Supreme Court of Missouri in specifically so holding (R. 337; 149 S. W. 2d, l. c. 801-802) was not in the least erroneous.

Notwithstanding that respondent's (plaintiff's) petition pleaded all of the facts essential to predicate petitioners' liability under the Safety Appliance Act, they assert that, in pleading that the occurrence producing plaintiff's injuries, and his injuries, resulted from "defendants' failure to perform their duty * * * to have said box car [L. & N. 12670] equipped with an efficient hand brake," the petition pleaded only a duty which was not owed by petitioners (defendants), because the act did not impose upon them the duty to equip this car, which belonged to another railroad, with an efficient hand brake. The language of the allegation just quoted, if strictly construed, does not place upon petitioners (defendants) the duty *to equip this car* with an efficient hand brake—it only placed upon them the duty *to have it so equipped when used and hauled by them*, whether it be so equipped by them or by someone else.

However, even if petitioners (defendants) were entirely correct in their assertion that the plaintiff's petition was predicated solely and only upon an alleged failure of petitioners to equip this car with an efficient hand brake, still it would have properly and sufficiently charged them with a duty which was owing by them under the Safety Appli-

ance Act. From what we have heretofore said upon the authority of this Court's decisions, it is manifest that the Act, simply, makes it unlawful for a carrier to "use," "haul," or "permit to be used or hauled on its line," "any car" not equipped with an "efficient hand brake." The carrier has the duty, and the option, to comply with the Act either by not using, hauling, or permitting to be used or hauled on its line, any car not so equipped, or by properly equipping such cars as it does use, haul or permit to be used or hauled on its line, so that they will meet the requirements of the Act. Under the Act, the duty of a carrier which does, in point of fact, use or haul a car, is to equip it with the required appliances (Cf. Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125; Texas & Pac. R. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995; Brady v. Terminal R. Assn. of St. Louis, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614), and, this, irrespective of the ownership of the car. This was clearly recognized by this Court in Chicago B. & Q. R. Co. v. United States, 220 U. S. 559, 31 S. Ct. 612, 55 L. Ed. 582, wherein this Court adopted from the decision of the Circuit Court of Appeals in that case the following language (220 U. S., l. c. 570):

> "The act made it unlawful for railroads to use cars not equipped as therein provided **and thereby imposed a duty upon railroad companies to equip cars accordingly.**" (Emphasis ours.)

Manifestly, there is no merit in petitioners' point concerning alleged error by the Supreme Court of Missouri with respect to the sufficiency of respondent's (plaintiff's) petition to charge petitioners with actionable violation of the provisions of the Safety Appliance Act relating to efficient hand brakes.

II.

The second point made by petitioners here, defendants below, ultimately resolves itself into a contention that respondent (plaintiff) failed to make a submissible case of a violation of the provision of the Safety Appliance Act relating to hand brakes because there was no proof that the hand brake on this box car, L. & N. 12670, contained any physical defects, or was "defective."

The language of both of Section 11 of the Safety Appliance Act (Act of April 14, 1910, c. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A., § 11), and of the order of the Interstate Commerce Commission entered, pursuant to the provisions of section 12 of the act, on March 13, 1911,* specifically requires that cars coming within their provisions be equipped with "**efficient**" hand brakes. We frankly concede our inability to find any decision of this Court which passes directly upon this aspect of the provisions of the act and of the order of the Commission relating to "efficient hand brakes," but, in numerous decisions of both the lower federal courts and the state courts, it repeatedly has been ruled that the terms "defective" and "inefficient" are not synonymous, and proof of the failure of a hand brake to work efficiently, when used in the customary and proper manner, is sufficient to establish a violation of the act and the order of the Commission, and to fasten liability upon the carrier, without proof of any specific physical defect in the appliance (Cf. Lehigh Valley R. Co. v. Howell, 2 Cir., 6 F. 2d 784, certiorari denied 268 U. S. 695, 45 S. Ct. 513, 69 L. Ed. 1162; Didinger v. Pennsylvania R. Co., 6 Cir., 39 F. 2d 798; Detroit, T. & I. R. Co. v. Hahn, 6 Cir., 47 F. 2d 59, certiorari denied 283 U. S. 842, 51 S. Ct. 489, 75 L. Ed. 1452; Chesapeake & O. R. Co.

*The pertinent provisions of this order of the Interstate Commerce Commission are hereinafter set out (post, p. 18).

v. Gowen, 6 Cir., 65 F. 2d 260; Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522; Henry v. Cleveland, C. C. & St. L. R. Co., 332 Mo. 1072, 61 S. W. 2d 340, certiorari denied 290 U. S. 627, 54 S. Ct. 70, 78 L. Ed. 546; Colwell v. St. Louis-S. F. R. Co., 335 Mo. 494, 73 S. W. 2d 222; Cason v. Kansas City Terminal R. Co. [Mo. Sup.], 123 S. W. 2d 133; Gieseking v. Litchfield & Madison R. Co. [Mo. Sup.], 127 S. W. 2d 700, certiorari denied 308 U. S. 583, 60 S. Ct. 104, 84 L. Ed. 488; Anderson v. Chesapeake & O. R. Co., 352 Ill. 561, 186 N. E. 185, certiorari denied 290 U. S. 675, 54 S. Ct. 93, 78 L. Ed. 583; Hosman v. Southern Pac. Co., 28 Cal. App. 2d 621, 83 Pac. 2d 88, certiorari denied 306 U. S. 656, 59 S. Ct. 645, 83 L. Ed. 1054; Spencer v. Seaboard Air Line R. Co., 201 N. C. 537, 160 S. E. 763, certiorari denied 285 U. S. 539, 52 S. Ct. 312, 76 L. Ed. 932).

The rationale of these decisions is clearly expressed in Didinger v. Pennsylvania R. Co., supra, wherein it is said (39 F. 2d, l. c. 799):

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner. * * *
>
> "Assuming the proper setting of the brake, the fact that it did not hold demonstrates its inefficiency."

The rationale of these decisions is, furthermore, founded upon the decisions of this Court in cases involving automatic couplers required by Section 2 of the Safety Appliance Act* (Cf. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; San Antonio & A.

*Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, 45 U. S. C. A. § 2.

P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 597, 61 L. Ed. 995), because the character of the devices required by the Safety Appliance Act in each instance—i. e., the hand brakes and the couplers—is described by their operation. The test of the observance of the duty imposed by the Safety Appliance Act with respect to both of these appliances—i. e., hand brakes and couplers—is the performance of the appliance, and is not whether the appliance contains a physical defect. In this connection, in Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, § 640, p. 1232, it was aptly said:

> "As in the case of automatic couplers, the test of compliance with this requirement of the statute [requiring efficient hand brakes] is primarily effectiveness in operation." (Bracketed portion supplied.)

The petitioners here do not contend, and cannot contend, that there was no proof of the inefficiency of the hand brake here involved, and, manifestly, there is no merit to the petitioners' contention that the Supreme Court of Missouri erred in permitting a recovery by respondent Wild upon proof of the inefficiency of the hand brake, even though there was no proof of a physical defect in the brake. In this connection, too, it is of interest to note that the contention of petitioners now under consideration constitutes a complete "about face" by them, for, in the trial court, the jury was instructed at their instance (R. 317-318), as well as at the instance of plaintiff (R. 315-316), that a recovery by plaintiff could be predicated upon a finding of the "inefficiency" of the hand brake.

III.

The third point made by petitioners here, to the effect that there was no proof of any violation of the order of the Interstate Commerce Commission entered on March 13, 1911, may be disposed of quickly.

That order of the Commission, which may be found set out in full in the appendix of Roberts' Federal Liability of Carriers, 2d Ed., Vol. 2, pp. 2010-2012, is, in so far as is here pertinent, as follows:

> "It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:
>
> BOX AND OTHER HOUSE CARS
>
> HAND BRAKES
>
> NUMBER. Each box or other house car shall be equipped with *an efficient hand brake* which shall operate in harmony with the power brake thereon. *The hand brake may be of any efficient design*, but must provide the same degree of safety as the design shown on Plate A." (Emphasis supplied.)

Manifestly, the requirement of the order of the Commission, like the requirement of Section 11 of the Safety Appliance Act, is simply that box cars, such as car L. & N. 12670 here involved, be equipped with "efficient hand brakes." The petitioners' use and hauling of a car which was not equipped with an efficient hand brake, in the instant case, violated both the act and the order of the Commission, for, as was said in Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, 163, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522:

> "* * * The order of the Interstate Commerce Commission is merely a direction to comply with the statute requiring an 'efficient hand brake.' * * *
>
> "Here the Commission has prescribed merely any 'efficient hand brake'; it has included no specific requirements and fixed no standard as filling the demands of 'efficiency.' * * *"

IV.

The fourth point made by petitioners here is to the effect that there was no proof of negligence so as to make the Federal Employers' Liability Act applicable to respond-

ent's (plaintiff's) case. This contention is so lacking in merit as to require no further discussion than to point out that it is directly in the teeth of the repeated pronouncements of this Court to the effect that a violation of the Safety Appliance Act is the legal equivalent of negligence per se under the Federal Employers' Liability Act (Cf. San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 484-485, 36 S. Ct. 626, 60 L. Ed. 1110; Moore v. Chesapeake & O. R. Co., 291 U. S. 205, 210-211, 54 S. Ct. 402, 78 L. Ed. 755).

V.

The fifth and final point made by petitioners here is that the Supreme Court of Missouri erred in not following the latest decision of the federal courts under the Safety Appliance Act relating to hand brakes—it being petitioners' assertion that such "latest decision" is the decision in Grand Trunk W. R. Co. v. Holstein, 6 Cir., 67 F. 2d 780.

The latest decision of the federal courts involving the provisions of the Safety Appliance Act relating to hand brakes is the decision in Spotts v. Baltimore & O. R. Co., 7 Cir., 102 F. 2d 160, certiorari denied 307 U. S. 641, 59 S. Ct. 1039, 83 L. Ed. 1522, and, although that decision is not mentioned specifically in the opinion and decision of the Supreme Court of Missouri below (R. 336-348; 149 S. W. 2d 800), the holdings in the two decisions are identical, and are in accord with the numerous decisions of the federal and state courts which are referred to under point I of this brief.

The decision in Grand Trunk W. R. Co. v. Holstein, 67 F. 2d 780, so strongly relied upon by petitioners here, is not only not the latest decision of the federal courts upon the matters here involved, but it is to be distinguished from the case at bar by the language of the Circuit Court of Appeals there when it said (l. c. 783):

> "* * * The statements of the plaintiff at the time, and on the scene, of his injury practically destroy the credibility of his later story upon the witness stand. * * *"

The decision in the Holstein case rested upon the lack of credence in the plaintiff's statements respecting the inefficiency of the hand brake, but there was no such situation presented in the case at bar. Here, at all times following his injury, plaintiff consistently stated that the cause of his injury was the inefficiency of the hand brake (R. 100, 102, 105, 259, 276, 287, 290, 293), and no witness testified that a brake which operated as this one did would be an efficient hand brake. This distinction was properly recognized by the Supreme Court of Missouri in its opinion and decision below (R. 240; 149 S. W. 2d, l. c. 803).

CONCLUSION.

In conclusion, respondent most respectfully submits that the Supreme Court of Missouri was not in error, and was not in the slightest conflict with the controlling decisions of this Court and the lower federal courts, in its rulings in the opinion and decision here sought to be reviewed. Accordingly, respondent most respectfully submits that petitioners' petition for a writ of certiorari herein should be denied by this Honorable Court, because the granting of such writ would serve no useful purpose, but, on the contrary, would result merely in further delaying respondent from receiving compensation to which he is entitled by law for his injuries.

Respectfully submitted,

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